**Malik Roofing Corporation *and* Sheet Metal Workers International Association, Local No. 18.** Case 30–CA–16097–1

April 10, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The General Counsel seeks a default judgment[1] in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by Sheet Metal Workers International Association, Local No. 18 (the Union) on July 23, 2002, the General Counsel issued the complaint on September 30, 2002, against Malik Roofing Corporation, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On November 12, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On November 14, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated October 18, 2002, notified the Respondent that unless an answer was received by October 25, 2002, a motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's motion for default judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, has been engaged in the business of manufacturing, distributing, and installing roofing systems out of its Whitewater, Wisconsin facility.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its operations, purchased and received products, goods, and materials valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Kent Malik Jr. held the position of the Respondent's president, and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent, as more particularly described in article I, section 1 of the collective-bargaining agreement, herein called the unit, constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> [A]ll employees of the Employer engaged in but not limited to the (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or nonferrous metal work and all other materials used in lieu thereof and of all air-veyor systems and air handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over installation and all duct lining; (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; and (e) all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

On May 17, 2000, the Respondent and the Union signed an Assumption of Agreement. By entering into the Assumption of Agreement, the Respondent agreed to be bound to the collective-bargaining agreement between the Union and the Southeastern Sheet Metal Contractors Association, Inc. (the Contractors Association), effective from September 1, 1998, through August 31, 2001. See

[1] The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer to the complaint. Accordingly, we construe the General Counsel's motion as a motion for default judgment.

*Malik Roofing Corp*., 337 NLRB No. 103 (2002) (not reported in Board volumes) (finding, in default judgment proceeding, that Respondent was bound by the collective-bargaining agreement).[2]

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and was recognized as the representative by the Respondent. This recognition has been embodied in a Letter of Assent dated May 31, 2000. At all times since May 31, 2000, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. See id.

By entering into the Letter of Assent, the Respondent agreed to be bound by any successor agreement within the jurisdiction of the Union unless written notice was given at least 90 but no more than 120 days prior to the expiration of the agreement. The Respondent never provided notice consistent with the Letter of Assent that it did not intend to be bound to the successor agreement between the Union and the Contractors Association. The Respondent is therefore bound to the current successor agreement between the Union and the Contractors Association, effective from September 1, 2001, through August 31, 2004.

By letter to the Union dated May 28, 2002, the Respondent impermissibly repudiated the collective-bargaining agreement with the Union and terminated the agreement effective August 31, 2002. The Respondent has, at all material times and since at least September 1, 2001, failed and refused to comply with the terms of the September 1, 2001, through August 31, 2004 agreement between the Union and the Contractors Association.

## CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.[3]

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees,[4] and to comply with the September 1, 2001, through August 31, 2004 agreement between the Union and the Contractors Association, and any automatic renewal or extension of it. We shall also order the Respondent to make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondent's failure to comply with the agreement since September 1, 2001. In addition, we shall order the Respondent to make whole the unit employees by making any contractually required fringe benefit fund contributions that have not been made on behalf of employees since September 1, 2001, including any additional amounts applicable to such delinquent payments in accordance with *Merryweather Optical Co*. 240 NLRB 1312, 1316 (1979).[5] Further, we shall require the Respondent to reimburse the unit employees for any expenses ensuing from its failure to make the required contributions since September 1, 2001, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to unit employees shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed

[2] Petition for enf. filed No. 02-3261 (7th Cir. Aug. 30, 2002).

[3] The complaint alleges a refusal to comply with the agreement since September 1, 2001, more than 6 months prior to the filing of the charge. However, the 10(b) 6-months limitations period is an affirmative defense that is waived if not timely raised. See, e.g., *Newspapaper & Mail Deliverers (New York Post*), 337 NLRB 608, 609 (2002) (citing *Public Service Co*., 312 NLRB 459, 461 (1993)). As the Respondent has failed to file an answer to the complaint or response to the notice to show cause raising a 10(b) defense, we shall therefore find the violations as alleged and issue an appropriate remedial order. See, e.g., *J. F. Morris Co*., 292 NLRB 869, 870 fn. 2 (1989), enfd. mem. 881 F.2d 1076 (6th Cir. 1989).

[4] Although the Board previously issued a bargaining order against Respondent in the case cited above that remains outstanding, the complaint in this case alleges additional violations that were not specifically remedied by the Board's order in the prior case. Thus, the complaint in the prior case alleged that Respondent had repudiated and failed to abide by the September 1, 1998–August 31, 2001 agreement between the Union and the Contractors Association, whereas the complaint in this case alleges that the Respondent repudiated and failed to comply with the September 1, 2001, through August 31, 2004 successor agreement between the Union and the Contractors Association. In these circumstances, and in the absence of any contention that such an order is inappropriate or unwarranted, we shall issue a second bargaining order against the Respondent. See generally *Clark United Corp*., 319 NLRB 328, 329 fn. 2 (1995), enfd. mem. 95 F.3d 1147 (5th Cir. 1996), and cases cited there. See also *Rish Equipment Co*., 173 NLRB 943, 945 (1968).

[5] To the extent that an employee has made personal contributions to a benefit or other fund that has been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

## ORDER

The National Labor Relations Board orders that the Respondent, Malik Roofing Corporation, Whitewater, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Sheet Metal Workers International Association, Local No. 18, as the exclusive collective-bargaining representative of the employees in the unit set forth below, by impermissibly repudiating, terminating, and refusing to comply with the 2001–2004 collective-bargaining agreement between the Union and Southeastern Sheet Metal Contractors Association, Inc., as required by the Letter of Assent:

> All employees of the Employer engaged in but not limited to the (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or nonferrous metal work and all other materials used in lieu thereof and of all air-veyor systems and air handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over installation and all duct lining; (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; and (e) all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the above-mentioned appropriate unit concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Comply with the terms and conditions of the September 1, 2001–August 31, 2004 collective-bargaining agreement between the Union and Southeastern Sheet Metal Contractors Association, Inc., and any automatic renewal or extension of it.

(c) Make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of its refusal to comply with the collective-bargaining agreement since September 2001, with interest, as set forth in the remedy section of this Decision.

(d) Make all contractually required benefit fund contributions, if any, that have not been made on behalf of unit employees since September 1, 2001, and reimburse unit employees for any expenses ensuing from its failure to make the required payments, in the manner set forth in the remedy section of this Decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Whitewater, Wisconsin, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2001.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Sheet Metal Workers International Association, Local No. 18, as the exclusive collective-bargaining representative of the employees in the unit set forth below, by repudiating, terminating, and refusing to comply with the September 1, 2001–August 31, 2004 collective-bargaining agreement between the Union and the Southeastern Sheet Metal Contractors Association, as required by our Letter of Assent agreement with the Union:

> All employees employed by us engaged in but not limited to the (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or nonferrous metal work and all other materials used in lieu thereof and of all air-veyor systems and air handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over installation and all duct lining; (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; and (e) all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the above-described bargaining unit.

WE WILL comply with the terms and conditions of the 2001–2004 collective-bargaining agreement between the Union and Southeastern Sheet Metal Contractors Association, Inc., and any automatic renewal or extension of it.

WE WILL make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of our refusal to comply with the collective-bargaining agreement since September 2001, with interest.

WE WILL make all contractually required benefit fund contributions, if any, that have not been made on behalf of unit employees since September 1, 2001, and reimburse unit employees for any expenses ensuing from our failure to make the required payments, with interest.

MALIK ROOFING CORPORATION